

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

18 Cr. 212 (RWS)

5 TYRONE WOOLASTON,

6 Defendant.

7 -----x

8 February 7, 2019
9 12:10 p.m.

10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
17 Southern District of New York

18 BY: ALISON G. MOE

19 THANE REHN

20 Assistant United States Attorneys

21 SHEARMAN & STERLING, LLP

22 Attorneys for Defendant

23 BY: CHRISTOPHER L. LaVIGNE

24 BY: BRIAN CALANDRA
25

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1 (Case called)

2 THE COURT: You may be interested to know that you
3 have interrupted the trial on the question of the trademarks
4 that you can get for marijuana. So, if you don't think that a
5 federal judge has to have a degree of flexibility, you are
6 wrong.

7 Let me hear from the defense with respect to its
8 motion. Where are we? I think a lot has been resolved.
9 Parenthetically, thank you very much. You all are good lawyers
10 and know what you are doing and I am grateful for that.

11 So, what do I have to deal with?

12 MR. LAVIGNE: I think there are a couple issues, your
13 Honor.

14 THE COURT: Yes.

15 MR. LAVIGNE: We have the pending motions. I think
16 the biggest issue on the motions is the government has filed a
17 motion to preclude us from raising an entrapment defense. We,
18 obviously, vigorously oppose that.

19 THE COURT: Well, look. You are not going to put on
20 anything in the government's case; you are going to cross
21 examine or whatever. So, there is nothing that is coming in,
22 whatever is going to come in on the government's case is going
23 to come in, right? And that either will or will not be some
24 evidence that one can -- we will see after it comes in -- what
25 follows from that.

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1 I don't see a problem as far as the government's case
2 is concerned, do you?

3 MR. LAVIGNE: Judge, this is one of the issues I have
4 spoken about with the government.

5 Essentially, they're going to have two principal
6 witnesses. They're going to have a confidential informant who
7 made a number of recordings and they're going to have a
8 cooperating witness. For entrapment, it is obviously our
9 burden to establish inducement. We intend to do that, in part,
10 by crossing the informant and asking him questions about a
11 number of recordings which the government is not going to
12 introduce.

13 So, I think --

14 THE COURT: Well, and what's the relevance of those
15 recordings? Those are the evidence of the inducement,
16 according to you?

17 MR. LAVIGNE: Yes, Judge; in part.

18 THE COURT: Okay. I understand your view. Anything
19 else? It is the cross of the cooperator. Anything else?

20 MR. LAVIGNE: In terms of how we are going to satisfy
21 our burden?

22 THE COURT: Well, we are not going to worry about that
23 at this time I don't think, are we? I mean, that may come up
24 in a question as to whether or not you have adequately
25 established an affirmative defense.

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1 MR. LAVIGNE: Absolutely.

2 THE COURT: In terms of evidence, which is all I want
3 to deal with at this point, it is just a question of the cross
4 of the cooperator, right?

5 MR. LAVIGNE: It is a question of the -- well, I
6 understand your Honor's question and I guess the issue is the
7 government moved to prevent any argument about entrapment.

8 THE COURT: Well, you are certainly not going to worry
9 about what we are going to argue in the closing or the opening.
10 There won't be any discussion of it in the opening.

11 MR. LAVIGNE: Of entrapment.

12 THE COURT: Yes. That's clear. It is an affirmative
13 defense, yes?

14 MR. LAVIGNE: Right.

15 THE COURT: So I don't think it is going to come up in
16 the openings. Am I correct?

17 MR. LAVIGNE: Your Honor, what our defense is going to
18 be is that he was -- the government superseded in this case
19 three weeks ago and they went from 2013 to 2018. We got the
20 3500 Monday night. Our defense on Count One is going to be
21 entrapment with respect to the sting, and to the extent there
22 is cooperator testimony about what happened before that, the
23 case is not proven.

24 So, I understand the Court's concern before me
25 affirmatively raising entrapment but I do want to at least

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1 explain to the jury that the evidence they're going to show is
2 that our client was picked up on these recordings, our client
3 allegedly did this, allegedly did that, but at the end of the
4 day this was entirely set in motion by the government and that
5 the government is not going to be able to meet their burden at
6 the end of the day.

7 But, our central defense to Count One is going to be
8 entrapment.

9 THE COURT: Let me hear from the government. Anything
10 else you want to add?

11 MR. LAVIGNE: Yes.

12 That's the issue with entrapment but I think at the
13 end of the day the cases we cite in our brief make very, very
14 clear that these motions are not granted. I don't know of one
15 case where the defense has been precluded from ever putting on
16 any evidence from ever raising entrapment so I think their
17 motion is definitely premature.

18 The other issue is the guns. The government is
19 seeking to introduce evidence of prior gun purchases that my
20 client was allegedly involved in from years before. They're
21 claiming that those are direct evidence of the conspiracy. We
22 don't think that's a close question. It is not inextricably
23 intertwined.

24 THE COURT: The guns in the safe?

25 MR. LAVIGNE: There are two issues. One is that our

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1 client was involved in an illegal gun purchase years before.
2 They're trying to introduce that from an unlicensed firearm
3 dealer and that the firearm itself was stolen. I don't think
4 that has any direct relevance to this case at all. It
5 certainly is not direct evidence, it is not inextricably
6 intertwined. Under 404(b) I don't believe it meets that
7 standard either for the reasons we laid out. I think that is
8 clear. Purchase from unlicensed dealer or stolen firearm, I
9 think the answer is very clear in the papers.

10 On the guns found in the safe, they are also seeking
11 to introduce that as direct evidence and I don't believe it is
12 direct evidence. It is not inextricably intertwined, this is a
13 narcotics conspiracy. The allegation is not that this is a
14 drug-and-gun-type relationship or that the house where
15 Mr. Williams lived is a drug den or that is coterminous. On
16 404(b) I don't believe they have met their burden either.
17 There wasn't notices for 404(b) and, in any event, there is
18 going to be law enforcement testimony that they saw my client
19 with the gun. The wiretap was not suppressed, there was going
20 to be wire evidence, my client is talking about. I think
21 taking these guns in a safe not directly connected to those
22 events is highly prejudicial so as a back top it would be on
23 Rule 403 grounds.

24 THE COURT: Okay.

25 MR. LAVIGNE: I think there were -- one other issue,

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1 the government moved to preclude us from introducing background
2 evidence like my client's employment, very unspecific, and I
3 believe a ruling on that is premature. We are going to seek to
4 introduce evidence of the fact that my client worked at the
5 fire department. That's going to be independently relevant to
6 the case when the informant is trying to get my client involved
7 and when he is trying to ensure that my client will be a
8 participant, he refers to him as fire. There is going to be
9 evidence about the fire house. And, I think my client's
10 locations at certain places will be relevant, the fact that he
11 was a full-time employee at the fire department and at United
12 Airlines is going to be highly relevant to whether he is a
13 member of a narcotics conspiracy.

14 The government moved to preclude us from referencing
15 the mandatory minimum sentence that my client faces. I was not
16 going to affirmatively elicit that, Judge.

17 We got voluminous 3500 material from the government
18 Monday night at about midnight which we have been going
19 through. We are looking at how it potentially could be
20 relevant to an entrapment issue because one of the case agents
21 says at one point, *We have to make this five keys so he will*
22 *get 10 years.* Now, I noticed this very recently so I haven't
23 looked at the law. I don't want to overstate my position but
24 just say I'm not conceding it.

25 Another issue I am happy to talk about or after the

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1 government responds to the motions has to do with discovery and
2 3500 production because there are some issues there that I need
3 to raise with the Court.

4 THE COURT: Okay.

5 MR. LAVIGNE: Whatever the Court prefers.

6 THE COURT: Let me hear from the government.

7 MS. MOE: Thank you, your Honor.

8 Let me first begin with the entrapment issue which is
9 the first issue Mr. Lavigne raised today.

10 To clarify, our concern really goes to opening
11 statements to the jury. It seems clear that the scope of this
12 issue, up until the government rests, will be limited to
13 cross-examination of government witnesses. So, to answer the
14 Court's question about what our concern is at trial, at this
15 point it's that the defense be precluded from arguing in
16 opening statements that the defendant was entrapped, that he
17 was set up, or any similar language that tries to signal to the
18 jury that that's a defense because I think, as the Court has
19 indicated, unless and until there is a basis for that in the
20 record, it is not appropriate for the defense to argue that to
21 the jury.

22 Our concern, in particular --

23 THE COURT: Well, but their position is, if I
24 understand it, is that the record will establish grounds for an
25 entrapment defense. Now, they may be wrong about that but

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1 that's their position.

2 MS. MOE: Yes, your Honor.

3 THE COURT: We can't -- I don't see any grounds --
4 well, you tell me. Are there grounds for limiting the
5 cross-examination of the cooperating witness?

6 MS. MOE: Your Honor, if I could clarify?

7 What we are talking about here is precluding opening
8 arguments.

9 THE COURT: I understand that, but that turns on the
10 evidence and it's their position that that cross-examination is
11 going to elicit what they believe will be the grounds for the
12 entrapment -- if I understand it correctly.

13 MS. MOE: I think the defense motion signals that they
14 think that that cross-examination may elicit facts that may
15 support an entrapment defense and that their brief essentially
16 signaled that we should see where this goes.

17 THE COURT: Well, of course. If they argue this and I
18 conclude that there is no basis and strike it at the close of
19 whenever I guess it would be at the government's case, I don't
20 know when, that's a risk for them, obviously, to a degree. But
21 I don't think I can limit the cross. And once the cross comes
22 in, their position is that they believe that will establish the
23 grounds for entrapment.

24 MS. MOE: So, our position would be that it would be
25 appropriate at trial for the defense to cross-examine

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1 government witnesses about the circumstances under which this
2 transaction occurred and if at the close of the government's
3 case they believe there is a factual predicate for presenting a
4 defense case on entrapment or pursuing that further either
5 through a jury instruction or in closings, that that's an issue
6 that we would address at that juncture.

7 THE COURT: Yes.

8 MS. MOE: But for purposes of determining what would
9 be an appropriate argument in an opening statement to the jury,
10 our concern is statements like, and I think Mr. Lavigne just
11 indicated that he was thinking of saying something like the
12 government won't meet its burden of proof because the evidence
13 will establish that the government initiated this transaction.
14 That, of course, isn't the standard for entrapment. It is
15 confusing to the jury, especially given that, as the Court
16 noted, entrapment is an affirmative defense. So, we are
17 concerned about the defense being able to plant sort of an
18 entrapment seed in the jury's mind before there is any evidence
19 in the record that would support it, especially given that that
20 kind of argument --

21 THE COURT: Well, we can certainly deal with that in
22 the sense that the word "entrapment" won't be used but how
23 about the government "initiating the case?"

24 MS. MOE: Your Honor, our view would be that
25 "initiating the case" isn't a basis for an entrapment defense

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1 and would be confusing to the jury.

2 THE COURT: All right. So.

3 MS. MOE: We think it would be confusing to the jury
4 to suggest otherwise. To suggest at the outset of the case
5 that the fact that the government is initiating a drug
6 transaction is entrapment or is a basis for an acquittal is
7 very confusing and would be prejudicial to the government.

8 THE COURT: The purchase of the gun is how far back?

9 MS. MOE: Your Honor, we anticipate that the testimony
10 would be that it was in approximately 2013, which is the
11 beginning of the charged conspiracy in this case -- I
12 apologize, your Honor -- 2015.

13 THE COURT: And the relevance?

14 MS. MOE: Your Honor, we think this relevance goes to
15 show --

16 THE COURT: By the way, what is this evidence?

17 MS. MOE: The evidence would be cooperating witness
18 testimony that the defendant wanted to purchased illegal
19 firearms, and that on one occasion he arranged a transaction to
20 buy illegal firearms and did so in a property that the
21 cooperating witness had control of because he needed a place to
22 meet the arms dealer. And, there would be further testimony
23 that over the years there were similar such conversations.

24 We don't anticipate calling a law enforcement witness
25 to talk about the serial number of the firearms and whether

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1 they were reported stolen or whether there were other
2 indicators but we think that given that this testimony would
3 come from a cooperating witness who was speaking to his
4 long-standing relationship with the defendant over the course
5 of a criminal conspiracy and given that the charges in this
6 case involve carrying a firearm in furtherance of a narcotics
7 conspiracy, that that's appropriate. It also would rebut any
8 argument from the defense that this firearm was carried for a
9 lawful purpose.

10 So, for example, if the defense intends to argue that
11 the reason the defendant had a firearm on the date that law
12 enforcement officers intended to apprehend him was because he
13 generally carried one for personal security, I think the
14 circumstances under which he purchased that firearm, speak to
15 that issue.

16 More broadly, in our motion, our focus was on the
17 evidence that was recovered from the safe. We think this is
18 direct proof of the charged conspiracy for a number of reasons.
19 First and foremost, that evidence was recovered the same day
20 that law enforcement agents tried to apprehend the defendant.
21 It was the same day that, in approaching him, he had been
22 carrying and reached for a Glock .40 caliber pistol which he
23 threw to the ground and fled.

24 We anticipate that cooperating witness testimony would
25 establish that the safe, which was recovered from that

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1 cooperating witness' residence that same day, belonged to the
2 defendant. That is, as we indicated in our papers,
3 corroborated by text messages between the cooperator and
4 defendant talking about that safe, that it was the defendant's.

5 The evidence recovered from the safe is intertwined
6 with the evidence relating to the seizure of the firearm that
7 day in Secaucus, New Jersey, for a number of reasons. The
8 first is the magazine that was fitted into the Glock that the
9 defendant threw to the ground was the wrong type of magazine.
10 The correct type of magazine was in his safe.

11 So, it goes to complete the picture, it shows the
12 relationship between Mr. Williams and Mr. Woolaston, that he is
13 letting him store these items in the basement of his residence,
14 that he has these items. The sheer volume of ammunition, I
15 think, and the fact that there is a speed-loading magazine
16 again rebuts any inference that the reason he had that firearm
17 was for a lawful purpose and not in furtherance of the
18 conspiracy.

19 We also think that this evidence, in addition to sort
20 of explaining the firearms evidence recovered from where the
21 defendant threw it to the ground on February 11th, we think it
22 is important to tell the story ever how this transaction
23 happened and that's because the night before the defendant went
24 to Secaucus, New Jersey, to complete this transaction, he went
25 to the house of the cooperating witness. They met there, they

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1 talked about the drug transaction, and the defendant brought
2 the sham drugs.

3 We anticipate that cooperating witness would establish
4 that during the conspiracy the defendant put some of the
5 deposit that the confidential informant had provided for this
6 transaction in that safe and that that night, when they were
7 talking about the transaction the next day, Mr. Williams saw
8 Mr. Woolaston go to the back where the safe was and his
9 understanding was that he was storing the sham drugs there as
10 well.

11 In other words, the fact that the defendant had this
12 safe in the cooperating witness' basement, the fact that he was
13 storing these items there, it is all part and parcel of the
14 same proof.

15 THE COURT: Yes.

16 MR. LAVIGNE: May I respond briefly?

17 THE COURT: Sure.

18 MR. LAVIGNE: Let me respond on the entrapment issue.

19 The government's motion was clear. I mean it read, *It*
20 *should be precluded to offer any type of entrapment defense.*
21 That was our real concern, that is why we responded the way
22 that we did. In terms of the burden on cross, I think it is
23 going to be highly inefficient and confusing for jurors if the
24 government puts on the informant, you know, the government
25 rests, and then we cross the informant afterwards.

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1 So, I think it is really critical, just logistically,
2 that we be permitted to ask the informant questions that could
3 form the basis to meet our burden on inducement. I don't
4 understand the government to be objecting to that.

5 Now, if at the close of government's case your Honor
6 still has questions, we obviously can put on our own case to
7 shore that up. I think the main thing is I don't want to be
8 limited in what I am arguing to the jury about what our theory
9 is going to be. That's a real concern.

10 THE COURT: Well, but what is your argument on opening
11 going to be?

12 MR. LAVIGNE: The argument on opening is going to be,
13 you know, without previewing my defense, but it is shortly
14 before trial, is essentially going to be this case is about a
15 sting. This case is about a sting. That's it. It is a sting
16 from 2017 to 2018. An informant went in, he was tasked by the
17 United States government to try to ferret out stuff in Newark.

18 THE COURT: Well, all right. That's fine. Whether
19 that is going to amount to entrapment or not is something that
20 comes up later, right?

21 MR. LAVIGNE: I think what I am going to say is 2017
22 and 2018, this is a scenario where it was set in motion by the
23 United States government and our client, under the law, is not
24 a conspirator, he was not a member of the conspiracy, and
25 everything else is a product of that. You are also going to

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1 hear evidence before 2018 which is one witness, and that
2 witness' testimony can't be trusted.

3 THE COURT: It seems to me that that statement of that
4 kind is appropriate.

5 Let me ask the government.

6 MS. MOE: Your Honor, the government would agree that
7 if the statements were limited to, *Here is how this transaction*
8 *were set up*, along the lines that Mr. Lavigne previewed --

9 THE COURT: Use of the word "sting" is fine.

10 MS. MOE: Yes, your Honor. Our concern --

11 THE COURT: And that this was initiated by the
12 government. That's fine.

13 MS. MOE: Yes, your Honor.

14 Where we would seek to draw the line is that defense
15 counsel not go a step further and make statements to the jury
16 like, *Because the government set up this transaction, the*
17 *defendant is not guilty*. Because that's an inaccurate
18 statement of the law as it applies to an entrapment defense and
19 would be misleading.

20 THE COURT: I agree. I agree. Thank you.

21 Are we clear on that then?

22 MR. LAVIGNE: It sounds like what the Court's ruling
23 is is -- I mean I can't argue to the jury in opening that
24 because this was initiated by the government our position, at
25 that end of the case, is he is going to be not guilty? That is

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1 our position.

2 THE COURT: I think you can say that.

3 MR. LAVIGNE: And the Judge will instruct you on the
4 law and you have to listen to the Judge? I won't use the word
5 "entrapment." I think I should be permitted to but if the
6 Court's ruling is premature, I will abide by that.

7 THE COURT: I think so. Yes.

8 MR. LAVIGNE: On the guns, Judge, can I --

9 THE COURT: What?

10 MR. LAVIGNE: On the gun issue, can I respond?

11 THE COURT: Yes.

12 MR. LAVIGNE: Briefly.

13 So, Mr. Woolaston is not on trial for possessing a
14 gun. He is on trial for possessing a gun in February 2018 in
15 connection with this narcotics conspiracy.

16 THE COURT: Right. Right.

17 MR. LAVIGNE: So, the idea that simply because there
18 was a gun in a safe means he had a gun on that day, it is not
19 relevant. They're linked to one another and there is not going
20 to be evidence.

21 THE COURT: There are two gun issues; there is the
22 safe gun issue and then there is the testimony about the
23 illegal purchase.

24 MR. LAVIGNE: Right. And I submit the illegal
25 purchase, as we laid out in our brief, is way too attenuated

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1 and it is not direct evidence under 404(b).

2 THE COURT: Right. Yes.

3 MR. LAVIGNE: On the safe though, Judge, this is a
4 gratuitous offering by the government to essentially show that
5 because there was a lot of stuff in this safe you should find
6 Mr. Woolaston guilty. There is ample evidence of his
7 possession of the gun. There is not evidence, from what I have
8 seen in the cooperator 3500 and 302s I have received, that at
9 this safe it was coextensive with a wide-ranging narcotics
10 conspiracy. This really seems like a one-off deal between the
11 two of them over the course of their relationship, one of maybe
12 three.

13 So, it is not like the stash house cases. I have
14 cited a case in my brief where this has been held in, I forget
15 the name of the case, it is in my opening brief, I think it is
16 distinguishable and I don't think they can meet their burden.

17 THE COURT: Okay.

18 I tell you where we -- well, I think we have been
19 around and we have settled the opening issue, I hope. The 2015
20 gun purchase, I think 404(b) risk is too high and I don't see
21 that it is really related to the charges here so that's out.
22 But, the safe and the ownership of the safe and the contents of
23 the safe, I think, are in as evidence relating to the
24 conspiracy, the charged conspiracy. The fact that the
25 defendant is in the fire department certainly is going to come

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1 out because I don't see any problem with that.

2 MR. LAVIGNE: Sorry, Judge. The fire department is
3 not -- I can't introduce evidence of that?

4 THE COURT: No. I say there is no problem about that.

5 MR. LAVIGNE: Oh okay. Okay.

6 MS. MOE: Your Honor, may I be heard briefly on that
7 topic?

8 THE COURT: Well, it explains the references in the
9 testimony.

10 MS. MOE: Yes, your Honor.

11 We certainly anticipate that there will be testimony
12 at trial that the defendant worked at a fire department.

13 THE COURT: Yes.

14 MS. MOE: In fact one of the meetings about the
15 transaction was at the fire department.

16 THE COURT: Isn't that what we are talking about?

17 MS. MOE: Our concern is that that evidence be limited
18 to the fact that he worked there and that it was at that
19 location.

20 THE COURT: What more is there?

21 MS. MOE: We heard defense counsel, I believe, in
22 context of another proceeding in this case, talk about the
23 defendant's work going into burning buildings, that he saved
24 people and those type of things. That's our concern.

25 THE COURT: Well, if he testifies, that's a horse of a

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1 different color.

2 MR. LAVIGNE: Right.

3 MS. MOE: Yes, your Honor.

4 THE COURT: Otherwise, it is not going to come in only
5 the government's case.

6 MS. MOE: Certainly, your Honor, and we would hope not
7 in opening statements either.

8 THE COURT: Yes. Agreed. No burning buildings in the
9 openings.

10 MR. LAVIGNE: Right. I will definitely abide by that,
11 Judge.

12 THE COURT: No mandatory minimums.

13 Now, there was an issue on discovery?

14 MR. LAVIGNE: Yes. There are a few issues, your Honor
15 and I don't want to burden the Court with these issues. As I
16 have said before, we have been trying to work these out with
17 the government.

18 THE COURT: Well, that's fine. I don't want to create
19 a problem if there is none.

20 MR. LAVIGNE: Well, I need to at least make a record.

21 Here is one issue that is very, very live. The
22 government is going to call a confidential informant to
23 testify. That confidential informant was a cooperating witness
24 for the U.S. Attorney's office for the Southern District of
25 Florida in 2004. The confidential informant got sentenced in

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1 2002 for narcotics offenses; post-plea, post-sentencing
2 cooperated, got a Rule 35, and his sentence went from 70 months
3 to 30 months. I have not gotten anything relating to that
4 cooperation. Okay? I got the 3500 Monday night at midnight.

5 I have asked the government about it. They've sent me
6 one document that was filed. I don't have the cooperation
7 agreement. I don't have any of the proffers. I don't have any
8 of that.

9 The government's position, and I know the law on this,
10 I can speak to the Court, the government's position is because
11 it is a different district's cooperator and with the DEA,
12 they're not going to ask the office for that information. They
13 may have made some inquiries, but as of last night and even
14 this morning, my understanding is I'm not going to get that.

15 That's a problem. That's a real problem. And I will
16 give some concrete examples.

17 Number one, after the confidential informant
18 testified, a DEA agent found out that the informant lied. He
19 lied in 1998. The DEA agent sent that lie to the prosecutor at
20 the trial where the informant testified. The prosecutor then,
21 I believe, sent a letter to the defense lawyer, and there was
22 an appeal and it went to the Eleventh Circuit and it was
23 ultimately affirmed.

24 In the 3500 I have seen they asked the informant about
25 that and he basically doesn't have a recollection. It was a

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1 statement he made in 1998 about his son. At the end of the day
2 I am not on a fishing expedition but if there is a cooperating
3 witness for the United States government, even if he is an
4 informant now, I am entitled -- I am entitled -- to the
5 information the government had back in 2004 when he was
6 cooperating with them. And I think that is just consistent
7 with the law, it is consistent with good practice, and it
8 limits my cross-examination of the informant.

9 So, I think that's one issue.

10 THE COURT: What would you have me do?

11 MR. LAVIGNE: I would -- I mean, I am finding out
12 about this four days before trial. I would have you direct the
13 government to get me the file and -- right now I feel limited
14 in my ability to cross the informant. I don't have the whole
15 picture. And we know how cooperators go. They come in and say
16 a whole bunch of stuff. There could be a whole set of issues
17 around their credibility.

18 THE COURT: Yes, yes, yes.

19 Let's hear from the government on this.

20 MS. MOE: Your Honor, just to sort of clarify the
21 backdrop, this witness is a confidential informant. He is not
22 a cooperating witness in this district. He was previously a
23 cooperating witness in the Southern District of Florida in
24 2002, and testified in 2003, and sentenced in 2004. That case
25 was run by a different prosecutor's office and different law

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1 enforcement agency. We think that the law is clear that those
2 members are not members of the prosecution team.

3 What we have produced to defense counsel are the
4 public filings related to that case and, critically, we have
5 produced the cooperating witness' testimony at a trial. That
6 was part of the cooperation that he provided. So, defense
7 counsel has a full trial transcript of the cooperating witness'
8 testimony detailing his prior bad acts and his
9 cross-examination by able defense counsel in that case.

10 The issue the defense counsel raised was something
11 about a lie that happened before and I just want to explain
12 what that was about.

13 So, after the trial in that case, the DEA noticed that
14 they had a report related to an administrative seizure of drugs
15 in 1997. What happened is that the DEA seized a suitcase from
16 this witness' son in a New York airport in 1997, and in
17 connection with that seizure of that suitcase of money, they
18 called the person who is now the cooperating witness. It was
19 in the file that they didn't credit that person's statement in
20 1997 that the money was legitimate. So, in an abundance of
21 caution, the DA gave that to the prosecutor, they turned that
22 over to the defense, that issue was litigated in the District
23 Court and the Court of Appeals, and the issue was affirmed.

24 So, what we are talking about is whether someone
25 remembers something they said on a phone call to the DEA in

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1 1997.

2 MR. LAVIGNE: Right.

3 MS. MOE: And all of that has been disclosed to
4 defense counsel.

5 We don't see an issue here. We have no reason to
6 believe that there are materials here that are at issue.
7 Critically, this witness is not a cooperating witness so the
8 kinds of things that would accord to defense here don't really
9 apply. We understand the defense has a right to seek to
10 impeach this witness but, for example, their role as a
11 cooperator really isn't at issue in this case. This person is
12 a confidential informant. So, questions about *Did you disclose*
13 *all of your criminal history to us?*, those aren't really at
14 issue. *Are you complying with the terms of a cooperation*
15 *agreement? Have you done so before?* Those aren't at issue in
16 this trial.

17 We think this is both factually distinct, very removed
18 in time. As a practical matter, the agent from the DEA who
19 handled that case, we understand, is deceased. We have reached
20 out to the prosecutor, who is no longer in that office, he is
21 working at another U.S. Attorney's office. And, this is a case
22 that is about 14 years old at this juncture so we think the law
23 is clear that we have met and exceeded our disclosure
24 obligations.

25 MR. LAVIGNE: Judge, I respectfully disagree. This is

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1 why I moved for early production for 3500 and Giglio materials
2 two weeks before trial. Ms. Moe is right, I got the trial
3 transcript. I got the trial transcript an hour and a half ago.
4 You know, it is wrong -- it is wrong to say that because
5 somebody is an informant they're not a government witness and
6 the United States government has, in its possession, files
7 relating to that witness. I don't even have the cooperation
8 agreement. I am asking for the file. It is not about this
9 1997 issue.

10 I don't understand why this is such a central witness
11 and if he is collateral, this diligence wasn't done sufficient
12 in time to get me any of this stuff. I think it is a problem.
13 I think the informant's credibility is going to be an issue.

14 We have evidence now from the 3500 that he was
15 constantly communicating with the case agent, that he was
16 constantly attempting to reach out to Xavier Williams. It is
17 absolutely going to be an issue. He is going to have to
18 testify from recollection about certain conversations because
19 he didn't record them.

20 So, it is definitely a live issue. It is definitely a
21 live issue and I think his credibility, as the Court knows from
22 countless trials, the informant's credibility is always an
23 issue and --

24 THE COURT: Well, what is it that the government --
25 granted a different office -- has that you want that you think

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1 relates to the witness' credibility?

2 MR. LAVIGNE: Sure.

3 So, three things. There are sealed documents on the
4 docket and I emailed the assistant U.S. Attorney about that two
5 days ago when we found it and we learned the identity of this
6 witness. I strongly suspect they relate to the informant's
7 cooperation. We have made efforts through my office, my
8 investigators, to try and get those. They're sealed, I can't
9 get access to them. That is an easy thing the U.S. Attorney's
10 office could get.

11 THE COURT: Not so easy. I take it they're sealed in
12 Florida.

13 MR. LAVIGNE: They're sealed in Florida. They're
14 sealed in Florida but I think the U.S. Attorney's office in
15 Florida could easily get them unsealed because they relate to a
16 material witness. And then the U.S. Attorney's office in the
17 Southern District of Florida has a file for the cooperator.

18 What it has, Judge, to put meat on the bones, the
19 proffer agreement, the proffer notes --

20 THE COURT: Well, I don't think I can order that.

21 Now, whether or not the government has adequately, if
22 they want to stand or fall on this issue I don't think I can
23 order it, can I?

24 MR. LAVIGNE: I think you can, your Honor. If I can
25 give some examples? Just in the CIPA context, Classified

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1 Information Procedures Act --

2 THE COURT: Practically speaking, today is Thursday.
3 And Monday? So, it's unreal. It's unreal. From a practical
4 point of view, right?

5 MR. LAVIGNE: Unless the Court adjourns the trial.

6 THE COURT: Well, yes. But this is so tangential --
7 when I say so tangential, the issue of his credibility is it
8 has been explained is debatable -- debatable -- as to how it
9 all comes out. So, I would not adjourn the trial on this
10 issue. That I would not do.

11 And, practically speaking, I don't think I, if I said
12 to the government -- will say make your best effort, but I
13 don't think it will work.

14 MR. LAVIGNE: I think, for the record, the Court
15 should order the U.S. Attorney's office, as a matter of Rule 16
16 and 3500, this is subsumed and the government needs to make
17 their best efforts to get it, and I think if the U.S.
18 Attorney's office actually reaches out to the U.S. Attorney's
19 office in the Southern District of Florida, I think something
20 will emerge. From past practice I am confident of that. I
21 have been in situations were these things happen and files are
22 at the office. Somebody at least needs to make a phone call.

23 THE COURT: Okay. I will direct the U.S. Attorney to
24 make the best efforts to obtain these materials.

25 MS. MOE: Your Honor, just so we understand the scope,

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1 I think Mr. Lavigne is talking about sealed ECF entries and so
2 we think the appropriate relief, if the defense wants to
3 investigate this on their own, again, it is our view that this
4 is not a Giglio or 3500 issue because these materials are not
5 in the possession of the prosecution team. But if defense is
6 separately making an application saying that they wish to
7 investigate this witness and they wish for the sealed ECF
8 entries in the Southern District of Florida's court records to
9 be unsealed, they're free to make an application to that Court.
10 This office certainly won't oppose that application. I think
11 that would be the appropriate procedure in this case.

12 THE COURT: Well, I think all of that is -- I think
13 you may be right but there is the problem of the timing --

14 MS. MOE: Yes, your Honor.

15 THE COURT: -- and there isn't time for that.

16 MS. MOE: Your Honor --

17 THE COURT: And so, that's why I say I would ask you
18 to use your best efforts to obtain this material through the
19 U.S. Attorney's office in Florida, and if they can't do it they
20 can't -- it won't be done and there it is.

21 MS. MOE: Your Honor, we certainly respect that. I
22 would just add --

23 THE COURT: Let's be clear about what we are talking
24 about -- Ye gods and little fishes! Are we talking about just
25 the sealed documents? Are we talking about something more?

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1 MR. LAVIGNE: Your Honor, what I am looking for is the
2 U.S. Attorney's office and its case agents had a file for this
3 informant. They had a cooperation agreement. They have notes
4 of --

5 THE COURT: You don't get the government's file.

6 MR. LAVIGNE: I don't want the government's file.

7 THE COURT: You don't get the government's file. You
8 may get statements by the witness.

9 MR. LAVIGNE: That's what I am looking for.

10 What I am looking for is the cooperation agreement --
11 I'm sorry. If I am speaking too broadly, your Honor, it is my
12 fault. What I want is information that bears on the
13 informant's credibility, his cooperation agreement, his Rule 35
14 letters and statements he made in his proffers about his prior
15 bad acts. That's all I am looking for. I think I am entitled
16 to it and the U.S. Attorney's office has it -- in the Southern
17 District of Florida. That's all I'm looking for.

18 THE COURT: All right.

19 MS. MOE: Your Honor, it is our position that the
20 government has no obligation to seek from another prosecutors
21 office, in an unrelated case, a complete copy of all of their
22 3500 material and productions from 2004.

23 THE COURT: No, no. He is not asking for that.

24 MS. MOE: Your Honor, I believe he has asked for all
25 of the proffer notes from back in 2003 and 2002 and all related

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1 paperwork. We think that far exceeds any reasonable
2 interpretation of the government's discovery obligations in
3 this case.

4 MR. LAVIGNE: I am looking for information that bears
5 on his credibility and one example is he was proffered -- and,
6 again, I raised this early to avoid a scenario like this --
7 information that bears on his credibility.

8 He was asked by one of the assistants during a recent
9 meeting about information surrounding this 1998 lie and he
10 doesn't remember. And in 2004 he met with the government
11 multiple times and he said information about his prior bad acts
12 and he lied about it to them. The fact that he lied to DEA and
13 a DEA agent felt it necessary to inform the prosecutor who
14 informed the trial defendant, it is significant. It is
15 significant. It is lying to a federal agent and I can't cross
16 examine him if he says he don't remember. I want to impeach
17 him. What I am looking for is that information. And the idea
18 that the United States attorney's office for the Southern
19 District of New York won't reach out to another U.S. Attorney's
20 office, honestly, I don't think that's right. I know there is
21 no monolithic government --

22 THE COURT: Look.

23 MS. MOE: Your Honor, on that issue, just to clarify?

24 The reports relating to that witness' statements in
25 1997 to a DEA agent on a phone call have been produced to the

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1 defense, they're publicly filed on the docket. So, the defense
2 has all of the DEA reports about that issue. We think a report
3 about a statement in 1997 on a phone call about a bag is so
4 tangentially removed from the issue in this case and certainly
5 beyond the scope of materials possessed by this prosecution
6 team --

7 THE COURT: Okay. Difficult. I am sorry it has taken
8 so long. I apologize. My fault.

9 It is where it is and that's the end of the story.
10 Practically speaking there is nothing, I think, that I could do
11 that would produce anything meaningful but, leaving that aside,
12 there is the whole problem of the timing and the extent of the
13 government's obligation, etc., etc. And so, the record is what
14 it is.

15 MR. LAVIGNE: I'm sorry. I didn't catch your Honor's
16 ruling.

17 THE COURT: So I'm not going to do anything and I'm
18 not going to put over the trial because I think the issue is
19 tangential. It does bear on -- it may -- it may -- might bear
20 on credibility. I'm not sure, from what I have heard, that it
21 does. I don't know how it comes out but -- so.

22 MR. LAVIGNE: Okay. There are two other issues I had.

23 THE COURT: Okay.

24 MR. LAVIGNE: I'm sorry, your Honor.

25 THE COURT: That's all right.

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1 MR. LAVIGNE: Again, I got this stuff late. I am
2 trying to work through it.

3 THE COURT: That's fine.

4 MR. LAVIGNE: I am trying to make my record.

5 THE COURT: That's fine. That's part of the problem.

6 MR. LAVIGNE: Well, that's why I moved for early
7 disclosure of a lot of these materials and requests of the
8 government.

9 The other issue is the government superseded to go
10 back to 2013, advised us that we had all communications between
11 our client and Xavier Williams and the alleged informants.
12 That universe was from 2015 to 2018. We now see agent
13 memoranda in the 3500 material that says multiple informants
14 were injected into this alleged DTO in 2013 and 2014.

15 We haven't been given any of that. I have raised this
16 with the government. They said they looked at it. They said
17 they haven't found anything. A concern I have is there were
18 two different agencies investigating this in 2013 and 2014 and
19 if there were informants who generated information or even
20 sources, and the sources or informants didn't identify my
21 client, I think we are entitled to that. And, it could bear on
22 entrapment.

23 I have raised this for the government and understand
24 what they say for the record but --

25 MS. MOE: Your Honor, as we have explained to defense

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1 counsel, our opinion is that the only two confidential
2 informants who had interaction were Xavier Williams or the
3 defendant, at the direction of law enforcement, are the two who
4 are identified to defense counsel.

5 It was the case during the course of this case that
6 the agents had other sources of information but in terms of
7 individuals who contacted these individuals, the universe of
8 that material has been disclosed.

9 THE COURT: I'm not sure what you are telling me. You
10 are saying there were additional informants in that period?

11 MS. MOE: Yes, your Honor, in that the agents had
12 contact with other informants. But as sources of information
13 to the government, not as informants who were having
14 interactions with Xavier Williams or other individuals at the
15 direction of law enforcement related to this case.

16 MR. LAVIGNE: I think we are entitled to know if those
17 sources identified our client or not.

18 MS. MOE: For the one who did, we have produced all of
19 those materials.

20 THE COURT: Yes. Yes.

21 MS. MOE: We have produced material of a witness who
22 said that he was recruited to participate in this conspiracy by
23 the defendant. Notes of those interviews and reports have been
24 disclosed to the defense.

25 THE COURT: Okay. All right. I think that's the end

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1 of that. Okay, anything else?

2 MR. LAVIGNE: The final point, your Honor, is on --
3 two days ago we got a toll record from the government that
4 allegedly shows our client speaking with Xavier Williams about
5 this August 15th delivery. Your Honor, in his opinion, noted
6 that the government has never been able to establish that our
7 client was linked to this alleged August 2015 delivery. We
8 have been given recordings where our client wasn't identified.
9 They got this toll and they said they got it from a trial
10 subpoena and we literally got it two days ago.

11 In the 3500 material again, not isolated or referenced
12 as Brady or anything in the last page of a thousand pages, it
13 says United Airlines identified a third-party as a suspect in
14 connection with this August 2015 sting. We think we are
15 entitled to have all the information that the agents and United
16 identified about this supposed suspect.

17 THE COURT: Well, the agents, yes. I think you are
18 entitled to anything that the agents have. I don't know about
19 United.

20 MR. LAVIGNE: I am not asking for United. I am asking
21 for any and all information that the agents generated about
22 this person. I am going to leave their name out of the record.

23 MS. MOE: Your Honor, I think what defense counsel is
24 referring to is one or two law enforcement reports from that
25 time period that indicate that other individuals are suspects,

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1 that are suspected of working at United and having been the
2 insider link at the time of that transaction. Those memorandum
3 have been disclosed to the defense. We have conferred with the
4 agents and our understanding is they were suspects based on a
5 variety of factors but that evidence has been produced to the
6 defense. We think, candidly, that it is a misidentification,
7 that they were canvassing various different links between
8 individuals and trying to surmise whom it might have been at
9 United Airlines. But I think the agent's thoughts about who it
10 might be, that of course has been disclosed to the defense that
11 that is sort of all of that, that's where that goes. We of
12 course know now that it was the defendant based on that phone
13 record but in terms of other individuals who are suspected of
14 being involved, that has been disclosed to the defense.

15 I would also add that it has been the government's
16 theory throughout this case that it was a group of individuals
17 working at United. So, the fact that other members of the
18 conspiracy might be culpable is certainly not exculpatory in
19 this context and we think we have satisfied our discovery
20 obligations on that topic.

21 MR. LAVIGNE: Let me just try to -- the line says HSI
22 Newark suspected that UA security manager X alerted Williams to
23 this operation. So, somebody at the United States Department
24 of Homeland Security generated something that gave him or her a
25 basis to say that. We are asking for that information and we

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1 don't have it. That's what we are asking for. That's
2 exculpatory, highly exculpatory. I don't know what it is. The
3 office says it is a mistake but I think I am entitled to more
4 information relating to that.

5 THE COURT: But I don't know that there is. Is there
6 any more information?

7 MS. MOE: We can speak to our case agent again to
8 confirm and will certainly do that. Our understanding, from
9 our conversation about this specific issue, is that it is a
10 hunch based on pattern of travel records and individuals who
11 were working together at certain times and that there is
12 nothing beyond that.

13 THE COURT: If there is any record of any other
14 investigation other than suspect or hunch, that, I think,
15 should be turned over.

16 MS. MOE: Yes, your Honor. And we will again confer
17 with the agents about what records were disclosed about the
18 specific issue.

19 THE COURT: What else? Don't tell me.

20 MR. LAVIGNE: I think that's it.

21 In terms of the trial days, your Honor, my
22 understanding is it will be Monday to Friday?

23 THE COURT: I guess so. Yes.

24 MR. LAVIGNE: Okay. That's obviously our request.

25 THE COURT: Sure.

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1 MR. LAVIGNE: Just given other scheduling issues.

2 THE COURT: That's the plan.

3 MS. MOE: Your Honor, on the topic of scheduling, we
4 had estimated that this would be a one-week trial. We just
5 wanted to bring to the Court's attention our estimate of the
6 length of the government's case depends, in part, on
7 understanding with defense counsel that they are likely to
8 stipulate to a series of records custodians' testimony. And
9 so, in terms of the projection of how long this trial will
10 take, we are hopeful to work that out with defense counsel. He
11 had indicated he is willing to stipulate to those items. Those
12 stipulations have not yet been signed so we wanted to bring, to
13 the Court's attention, our working understanding of the length
14 of the trial depends on that assumption so that if, for
15 example, there weren't a stipulation to phone records,
16 authenticity and the like --

17 THE COURT: Assuming rationality and the best case,
18 what is the shortest estimate?

19 MS. MOE: I think if those records custodians aren't
20 needed to testify and there are stipulations for those
21 witnesses, our estimate would be that we would rest on
22 Wednesday or Thursday of next week.

23 THE COURT: Okay.

24 MS. MOE: If seven or so different witnesses need to
25 testify, I think it would be considered longer.

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1 THE COURT: Okay.

2 Anything else?

3 MR. LAVIGNE: No, your Honor. I think that the
4 timing -- can I have one moment?

5 THE COURT: Sure.

6 (Counsel conferring)

7 MR. LAVIGNE: Oh, yes. I'm sorry, Judge.

8 THE COURT: That's all right.

9 MR. LAVIGNE: I don't want to step on any toes.

10 We have an instruction on manufactured venue. I had
11 planned on -- you know what? I will withdraw that. I think we
12 can deal with that down the road.

13 THE COURT: Okay.

14 Thank you, all.

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